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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GOLDMAN, SACHS & CO.,
GOLDMAN SACHS MONEY MARKETS INC.,
DAVID B. FORD and FRANCIS J. GAUL, JR.,

Petitioners,

—against—

KRISTINE M. UTLEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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November 21, 1989

QUESTION PRESENTED

Whether or not, upon petitioners' timely motion under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, respondent should have been required, before proceeding further under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, to submit her employment discrimination claim to New York Stock Exchange arbitration pursuant to the agreement to arbitrate all controversies arising out of her employment or the termination of her employment, which she entered into when she registered with the Exchange as a General Securities Representative of petitioners.

STATEMENT PURSUANT TO RULE 28.1

The parent company of petitioner Goldman Sachs Money Markets Inc. is GSMMI Holdings Inc., which is wholly owned by petitioner Goldman, Sachs & Co. ("Goldman Sachs"). The parents of Goldman Sachs are Goldman Sachs Group, L.P., a general partner of Goldman Sachs, and Sumitomo Bank Capital Markets, Inc., which is an affiliate of Sumitomo Bank and a limited partner of Goldman Sachs.

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KRISTINE M. UTLEY,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners Goldman, Sachs & Co. ("Goldman Sachs"), Goldman Sachs Money Markets Inc. ("GSMMI"), David B. Ford ("Ford") and Francis J. Gaul, Jr. ("Gaul"), defendants below, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit (the "Court of Appeals"), entered on August 23, 1989, which affirmed an order of the United States District Court for the District of Massachusetts (the "District Court ") dated January 17, 1989.

The District Court had refused to enforce respondent's individually-accepted agreement to arbitrate all controversies arising out of her employment or the termination of her employment. Relying exclusively upon this Court's

opinion in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), which held that an award in favor of the employer-defendant in a completed arbitration under a collective-bargaining agreement could be received in evidence but was not entitled to preclusive effect under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII"), the District Court denied petitioners' motion to stay this action pending the arbitration of respondent's sex discrimination claim.

The Court of Appeals affirmed the District Court's order, holding that, regardless of the effect, as evidence or otherwise, that an award in arbitration might have in the Title VII action, respondent's agreement to arbitrate could not be enforced at all because Congress had intended to prohibit the enforcement of agreements to arbitrate Title VII claims. *See Utley* v. *Goldman Sachs & Co.*, 883 F.2d 184, 187 (1st Cir. 1989).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 883 F.2d 184 and is reprinted at Appendix A hereto. The memorandum decision of the United States District Court for the District of Massachusetts is reported at 50 Fair Empl. Prac. Cas. (BNA) 1086 and is reprinted at Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on August 23, 1989, and is reprinted at Appendix C hereto. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED [1]

The statutory provisions involved in this case are:

Federal Arbitration Act

Section 2, 9 U.S.C. § 2
Section 3, 9 U.S.C. § 3
Section 4, 9 U.S.C. § 4

Title VII of the Civil Rights Act of 1964

Section 706, 42 U.S.C. § 2000e-5

Federal Rules of Civil Procedure

Rule 53

STATEMENT OF THE CASE

Respondent, Kristine M. Utley, was hired by Goldman Sachs on or about July 8, 1985 as a fixed income sales associate. She worked as a fixed income sales trainee in Goldman Sachs' New York headquarters office until she became a sales associate of GSMMI on or about February 10, 1986 and was transferred to Goldman Sachs' Boston office. Goldman Sachs, a New York partnership, is an investment banking firm and broker-dealer and a member of numerous national securities exchanges, including the New York Stock Exchange, Inc. ("NYSE"). GSMMI is a corporation that is wholly owned by Goldman Sachs and is a member of the NYSE and other securities exchanges.

As a condition of her employment with both Goldman Sachs and GSMMI, respondent was required to register with the NYSE as a General Securities Representative. On

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[1] The text of these provisions is reprinted in full at Appendix D hereto.

or about August 20, 1985, respondent, while employed by Goldman Sachs, executed a Uniform Application for Securities Industry Registration or Transfer ("Form U-4"), requesting registration with the NYSE and other self-regulatory organizations ("SRO's") in the securities industry. Another Form U-4 executed by respondent and dated March 19, 1986 reported respondent's new employment with GSMMI.

Representation Number 5 on the signature page of the copies of the Form U-4 executed by respondent consists of an arbitration commitment, pursuant to which respondent agreed "to arbitrate any dispute, claim or controversy that may arise between me and my firm . . . that is required to be arbitrated under the rules, constitutions or by-laws of the organizations with which I register, as indicated in item 10 as may be amended from time to time." In each case, item 10 requested respondent's registration with the NYSE and other SRO's.

NYSE Rule 347 states:

> Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

2 New York Stock Exchange Guide (CCH) ¶ 2347.

In the fall of 1987, petitioners requested that respondent transfer to Goldman Sachs' New York office pursuant to a program for the consolidation of certain fixed-income

securities sales operations. Respondent refused to accept the New York position or even to discuss the requested transfer directly with petitioners. Because, under the consolidation, there were no other opportunities available in the Boston office for respondent, her employment was terminated on November 25, 1987.

On November 27, 1987, respondent filed a Charge of Discrimination with the Massachusetts Commission Against Discrimination and, effective January 26, 1988, the United States Equal Employment Opportunity Commission (the "EEOC"), alleging that she had been subjected to a sexually harassing work environment and that Goldman Sachs and Gaul, a Vice President of Goldman Sachs and the Resident Manager of GSMMI operations in Boston, had discriminated against respondent on account of her sex in requesting that she relocate to New York.

On or about December 3, 1987—prior to commencing the present action—respondent filed a Verified Complaint in the Superior Court of Masachusetts, Suffolk County (the "State Action"), alleging in substance that Goldman Sachs, Gaul and Ford, a general partner of Goldman Sachs, had subjected respondent to a sexually harassing work environment and had discriminated against her on the basis of her sex in requesting that she transfer to New York and in terminating her employment after her repeated refusals to discuss the proposed transfer. Respondent asserted various common law claims sounding in contract or tort and alleged violations of Massachusetts anti-discrimination statutes, Mass. Gen. L. ch. 151B; Mass. Gen. L. ch. 12, § 11I. Respondent subsequently filed an Amended Verified Complaint adding GSMMI as a defendant.

Petitioners moved for a stay of the State Action pending arbitration of respondent's claims before an arbitral panel

of the NYSE pursuant to the arbitration commitment in her Form U-4. The Massachusetts Superior Court originally denied petitioners' motion without opinion. After remand from the Appeals Court of the Commonwealth of Massachusetts (the "Appeals Court"), the Superior Court entered an order dated May 26, 1989, granting petitioners' motion with respect to respondent's common law claims and denying the motion with respect to her statutory claims. Petitioners have noticed an appeal to the Appeals Court from that order.

After receiving a Notice of Right to Sue from the EEOC, respondent commenced this action on or about April 6, 1988, alleging that petitioners had discriminated against her on account of her sex in violation of Title VII, based upon the identical factual allegations, circumstances and events as those underlying the State Action. The Verified Complaint alleged that the District Court had subject matter jurisdiction over that claim pursuant to 28 U.S.C. §§ 1331, 1343 and Title VII.

Petitioners filed a motion in the District Court on or about April 26, 1988 for an order staying all proceedings in this action pending the conclusion of arbitration before the NYSE pursuant to Section 3 of the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 3. The District Court denied petitioners' motion and refused to enforce respondent's arbitration agreement, even in the first instance, concluding merely that its decision was "compelled" by this Court's decision in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36.

Petitioners appealed to the Court of Appeals, arguing that respondent should be required to arbitrate her employment discrimination claim, at least in the first instance, even if she subsequently may pursue her Title VII claim in federal court. The Court of Appeals affirmed the District Court's

decision, holding that "Congress intended to preclude even a temporary prospective waiver of [a] judicial forum" for Title VII claims. *Utley* v. *Goldman Sachs & Co.*, 883 F.2d at 187. The Court of Appeals also held that the District Court had acted within its discretion when it declined to stay this action pending arbitration of the arbitrable claims in the State Action. *Id.*

The Court of Appeals acknowledged this Court's recent decisions enforcing pursuant to the FAA agreements to arbitrate claims under federal statutes absent a showing of specific congressional intent to preclude a waiver of judicial remedies. It refused, however, to enforce respondent's agreement to arbitrate her Title VII claim, even in the first instance. The Court of Appeals held that this Court's recent decisions requiring the rigorous enforcement of arbitration agreements did not involve employment discrimination disputes and, thus, did not "disturb its prior ruling in *Alexander* that arbitration agreements do not preclude an independent right of access to a judicial forum for resolution of Title VII claims." *Id.* at 186.

The Court of Appeals declined to read the holdings of *Alexander* and its progeny as limited to grievance arbitrations pursuant to collective-bargaining agreements, and held that an employee cannot be forced to arbitrate a Title VII claim in the first instance because she "cannot waive prospectively her right to a judicial forum," even temporarily, "regardless of the type of employment agreement which she signs." *Id.* at 187. In addition, the Court of Appeals concluded that Title VII's provision of an express private right of action involving substantive rights that have " 'historically been the sole province of Article III adjudication' " demonstrates Congress' intent to prohibit arbitration, even in the first instance, of disputes involving those rights. *Id.* (citation omitted).

REASONS FOR GRANTING THE WRIT

A conflict among the Circuits has not yet emerged on the question presented, but the Court of Appeal's finding of a conflict between these two important federal statutes should be reviewed now because it is itself in radical conflict with the Court's recent decisions under the FAA. Moreover, a jurisprudence under which no role in the vindication of Title VII and other significant federally-created employment rights is assigned to arbitration under agreements covered by the FAA should not be allowed to prevail indefinitely without review by this Court.

In its recent decisions, the Court has attempted to put an end to judicial hostility towards arbitration and has enforced pursuant to the FAA agreements to arbitrate claims asserted under a series of complex federal statutory schemes. *See, e.g., Rodriguez De Quijas* v. *Shearson/American Express, Inc.*, 109 S. Ct. 1917 (1989) (Securities Act of 1933, 15 U.S.C. § 77a *et seq.*); *Shearson/American Express Inc.* v. *McMahon*, 482 U.S. 220 (1987) (Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*, and Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (federal antitrust laws, 15 U.S.C. § 1 *et seq.*). The Court has made clear that arbitrators are capable of interpreting and enforcing comprehensive federal statutes and that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 628. In protecting the significant national policy favoring arbitration, this Court has imposed upon the party opposing arbitration the burden of estab-

lishing that Congress intended to prohibit the enforcement of an agreement to arbitrate the statutory claim at issue. *See Shearson/American Express Inc.* v. *McMahon*, 482 U.S. at 226-27 (citing *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 628).

In addition to the inconsistency with this Court's decisions in *Mitsubishi*, *McMahon* and *Rodriguez*, the Court of Appeals' refusal to enforce respondent's individually-accepted agreement to arbitrate this dispute was premised upon a misconstruction and misapplication of the Court's decisions in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, and its progeny. Those decisions denied preclusive effect on employees' statutory claims to awards in arbitrations under collective-bargaining agreements between their employers and their unions.[2] This Court has not extended those decisions, which address only the preclusive effect of previously-held labor arbitrations on federal statutory claims, to determinations of the arbitrability of such claims in the first instance under the FAA.

Moreover, the Court should grant this petition because the Court of Appeals' misapplication of this Court's FAA arbitration precedents involves not only the proper construction of Title VII, but extends inevitably to claims under federal statutes that regulate other aspects of the employment relationship. The reasoning of the Court of Appeals is identical to that of other courts that have refused to enforce valid individually-accepted agreements to

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[2] *See also McDonald* v. *City of West Branch*, 466 U.S. 284 (1984) (unappealed arbitration award pursuant to terms of collective-bargaining agreement not entitled to *res judicata* or collateral estoppel effect in action under 42 U.S.C. § 1983); *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981) (claim under Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.*, not barred by prior submission of grievance to dispute resolution procedures pursuant to terms of collective-bargaining agreement).

arbitrate other statutory claims. Indeed, in the current term, the Court vacated and remanded for further consideration in light of its decision in *Rodriguez De Quijas* v. *Shearson/American Express, Inc.*, 109 S. Ct. 1917, a decision of the United States Court of Appeals for the Second Circuit holding that claims under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"), are not arbitrable. The Second Circuit had relied upon the same unjustified extension in the ERISA context of the Court's labor arbitration decisions that premised the Court of Appeals' Title VII decision in this case. *See Bird* v. *Shearson/American Express, Inc.*, 871 F.2d 292 (2d Cir.), *vacated and remanded*, 58 U.S.L.W. 3239 (U.S. Oct. 10, 1989) (No. 89-231).

Thus, this case presents an important and recurring question of federal law and warrants this Court's review in order to clarify its arbitration precedents and guide the lower courts in defining the scope of the FAA. Moreover, if the Court were to grant this petition, it would have the opportunity to clarify the distinction between its labor arbitration decisions and its decisions under the FAA and to protect the overcrowded dockets of the federal courts from disputes that should properly be submitted to, and might be finally settled by, arbitration.

I.

The Court Should Grant Certiorari To Correct The Misapprehension That Congress Intended To Preclude Arbitration Of Title VII Claims, Even In The First Instance, Pursuant To An Individually-Accepted Agreement To Arbitrate Such Claims Under The FAA.

The FAA represents a congressional declaration of national policy favoring arbitration and requires the arbitra-

tion of disputes that the parties have expressly agreed to arbitrate pursuant to a valid agreement. *See Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 625-26; *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 219-20 (1985). In its recent decisions, the Court has reaffirmed this strong federal policy and has repeatedly held that courts must "rigorously enforce agreements to arbitrate.' " *Shearson/American Express Inc.* v. *McMahon*, 482 U.S. at 226 (quoting *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. at 221; *see also Perry* v. *Thomas*, 482 U.S. 483, 490 (1987); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 625-26; *Southland Corp.* v. *Keating*, 465 U.S. 1, 10 (1984); *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). Consistently with the purpose and policy underlying the FAA, the Court has observed:

> [W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.

Mitsubishi Motors Corp. v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 626-27.[3]

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[3] *Accord Rodriguez De Quijas* v. *Shearson/American Express, Inc.*, 109 S. Ct. at 1920 (" 'the old judicial hostility to arbitrations' . . . . has been steadily eroded over the years" (quoting *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942)); *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. at 24 (the FAA "is a congressional declaration of a liberal federal policy favoring arbitration . . . [and] questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration"); *Southland Corp.* v. *Keating*, 465 U.S. at 10 (in enacting the FAA, "Congress declared a national policy favoring arbitration . . . [that] mandated the enforcement of arbitration agreements"); *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974).

A court's duty to enforce an arbitration agreement is not diminished when a party bound by such an agreement raises a claim founded upon statutory rights. *See Shearson/American Express Inc.* v. *McMahon*, 482 U.S. at 226. Rather, the court must enforce the agreement unless it finds that, in enacting the statute, Congress intended "to preclude a waiver of judicial remedies, or that such a waiver of judicial remedies inherently conflicts with the underlying purposes" of the statute. *Rodriguez De Quijas* v. *Shearson/American Express, Inc.*, 109 S. Ct. at 1921 (citing *Shearson/American Express Inc.* v. *McMahon*, 482 U.S. at 226-27).

In reaching its decision below, the Court of Appeals concluded that Congress had intended that the strong presumption of arbitrability under the FAA would not apply to Title VII claims. The evidence on which the court below based its conclusion, however, has never been accepted by this Court as sufficient to establish a legislative purpose to foreclose arbitration of an individually-accepted arbitration commitment. The fact that Congress provided an express right of action in Title VII does not demonstrate an intent to override the FAA. To the contrary, this Court has rejected the contention that arbitrators are incapable of properly deciding claims premised upon statutory rights, *see Shearson/American Express Inc.* v. *McMahon*, 482 U.S. at 226, and, in *Rodriguez*, held that a claim arising under the express private right of action provided in Section 12 of the Securities Act of 1933, 15 U.S.C. § 77*l*, must be submitted to arbitration pursuant to an agreement to arbitrate between a securities firm and its customer. *See Rodriguez De Quijas* v. *Shearson/American Express, Inc.*, 109 S. Ct. 1917. If the provision of an express private right of action does not demonstrate a congressional intent to override the strong national policy favoring arbitration with respect to Securities Act claims, it should not do so with respect to Title VII claims.

The Court of Appeals also found evidence of Congress' intent to preclude arbitration of Title VII claims, even in the first instance, in the congressional desire that the statute's proscription of employment discrimination be accorded the "highest priority." *Utley* v. *Goldman Sachs & Co.*, 883 F.2d at 187. However, this Court observed in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. at 55, that arbitration provides a "relatively inexpensive and expeditious means for resolving a wide range of disputes, including claims of discriminatory employment practices . . . [and] may well produce a settlement satisfactory to both employer and employee." Thus, contrary to the Court of Appeals' conclusion, prior resort to arbitration might promote, rather than defeat, the congressional preference for the expeditious resolution of Title VII claims.

Moreover, the Court of Appeals' presumption that a claim asserted under Title VII is not arbitrable because it involves adjudication of rights that historically have been "the sole province of Article III adjudication," *Utley* v. *Goldman Sachs & Co.*, 883 F.2d at 187 (citation omitted), manifests an unfounded hostility towards arbitration that is out of step with this Court's decisions and would frustrate Title VII's statutory policy of promoting conciliation and informal resolution of employment discrimination claims. The Court has rejected the notion that Congress intended that claims that are within the exclusive jurisdiction of the federal courts may not be arbitrated pursuant to an individually-accepted arbitration agreement. *See Shearson/American Express Inc.* v. *McMahon*, 482 U.S. 220 (agreement to arbitrate claim under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), enforceable notwithstanding exclusive federal jurisdiction provision); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (agreement to arbitrate federal

antitrust claim enforceable notwithstanding exclusive federal jurisdiction over such claims).

Indeed, there is no suggestion in the language or legislative history of either Title VII or its 1972 amendments of any congressional intent to preclude the enforcement of individually-accepted commitments to arbitrate employment discrimination claims. To the contrary, the provisions of that statute evince Congress' preference for the informal, expeditious resolution of employment discrimination disputes and, thus, manifest a congressional intention to require enforcement of individually-accepted agreements to arbitrate such claims, at least in the first instance.

For example, Section 706(f)(5) grants discretion to judges presiding over Title VII claims to "appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure" if the case has not been scheduled for trial "within one hundred and twenty days after issue has been joined." 42 U.S.C. 2000e-5(f)(5). Rule 53(a), Fed. R. Civ. P., empowers the trial court to appoint a master even over the objections of the parties, and the master's findings of fact are subject to review under the "clearly erroneous" standard. *See, e.g., Brown* v. *Wesley's Quaker Maid, Inc.*, 771 F.2d 952 (6th Cir. 1985), *cert. denied*, 479 U.S. 830 (1986). Section 706(f)(5) evinces Congress' determination to authorize trial courts to require the parties to a Title VII dispute to present the matter—at least in the first instance—to non-Article III adjudication where such an approach would likely contribute to the expeditious resolution of the case. This manifestation of congressional intent is especially significant because, although ordinarily reference to a master is "the exception and not the rule," Fed. R. Civ. P. 53(b), under Title VII this procedure may be routinely invoked. *See* 118 Cong. Rec. 4924 (1972) (statement of Sen. Javits).

Thus, the Court of Appeals erroneously concluded that Congress intended to preclude arbitration of Title VII claims, even in the first instance, pursuant to an individually-accepted agreement to arbitrate such claims under the FAA. The Court should grant this petition for a writ of certiorari and reverse the Court of Appeals' decision in order to ensure that these important federal statutes are properly applied.[4]

II.

The Court Should Grant Certiorari In Order To Correct The Misapplication Of This Court's Labor Arbitration Decisions And To Clarify The Distinction Between Those Decisions And The Court's Determinations Under The FAA.

In relying upon this Court's decision in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, the Court of Appeals appears to have confused the issue in this case, *i.e.*, the applicability and enforceability of an individually-accepted arbitration commitment in the context of an employment discrimination claim under Title VII, with the issue in *Alexander*—whether courts should give preclusive effect in

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[4] In addition, a reversal of the decision of the Court of Appeals would enable the parties to arbitrate all of the claims arising from the termination of respondent's employment, as respondent agreed to do, and would eliminate the wasteful prospect of duplicative proceedings in separate fora. Where, as here, an employment discrimination claimant who has agreed to arbitrate any dispute arising out of her employment or its termination asserts claims under Title VII and state statutory and common law based upon identical factual allegations and circumstances, see above at p. 6, the parties would be required to litigate those claims in several separate proceedings unless the courts enforce the agreement to arbitrate those claims. Here, for example, the courts would require the parties to litigate the Title VII claim in federal court and the state statutory claims in state court and simultaneously to arbitrate respondent's common law claims, even though all of those claims are premised upon the same alleged transactions and occurrences.

actions under Title VII to previously-rendered arbitral awards under a non-discrimination provision of a collective-bargaining agreement. In *Alexander* this Court held that submission of an employment discrimination claim to grievance arbitration pursuant to a collective bargaining agreement did not preclude a subsequent trial *de novo* of a Title VII claim. Recognizing that labor arbitration is a specialized form of dispute resolution limited to the interpretation and application of collective-bargaining agreements, the Court concluded that grievance arbitration was a "comparatively inappropriate forum for the *final* resolution of rights created by Title VII." *Id.* at 56 (emphasis supplied).

This Court's arbitration decisions clearly distinguish between grievance arbitration pursuant to a collective-bargaining agreement and private arbitration under the FAA. While FAA arbitration merely provides a non-judicial forum for the resolution of private disputes, *see Rodriguez De Quijas* v. *Shearson/American Express, Inc.*, 109 S. Ct. at 1920 (citing *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 628), arbitration under a collective-bargaining agreement is a more limited form of dispute resolution "by which meaning and content are given to [that] agreement." *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960).

Consistently with this distinction, the labor arbitrator is limited to interpreting and applying the collective-bargaining agreement in accordance with the intent of the contracting parties and the "industrial common law of the shop," and has no authority to adjudicate the individual rights and obligations of the disputants under federal statutes—a circumstance that is only "mitigated where a collective-bargaining agreement contains provisions facially similar to those of Title VII." *Alexander* v. *Gardner-Denver Co.*,

415 U.S. at 53, 57.[5] In contrast, this Court has recognized that arbitrators in private arbitrations under the FAA are authorized to, and are fully capable of, interpreting and applying the provisions of federal statutes. *See Shearson/American Express Inc.* v. *McMahon*, 482 U.S. at 232; *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 628, 633-34.

Labor arbitration has also been given restricted effect because of this Court's concern that "the union's exclusive control over the manner and extent to which an individual grievance is presented" might deprive an employment discrimination claimant of a full and fair opportunity to prosecute such claims in an arbitration pursuant to a collective-bargaining agreement. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. at 58, n.19. This Court has suggested that, under certain circumstances, the union prosecuting the employee's discrimination claims might subordinate "the interests of the individual employee . . . to the collective interests of all employees in the bargaining unit." *Id.* There is no possibility of such a conflict of interest in private arbitrations under the FAA, in which the employee would have full control over the prosecution of the claim and ample opportunity to protect his personal interests.

Despite concern about whether labor arbitration is appropriate for the final determination of employment discrimination claims, the Court in *Alexander* recognized

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[5] The collective-bargaining agreements in the Court's labor arbitration cases limited the role of the arbitrators to the interpretation of the terms of those agreements. Any award based upon other considerations, such as the provisions of federal statutes, would have been subject to avoidance as beyond the scope of the arbitrators' authority. *See McDonald* v. *City of West Branch*, 466 U.S. at 291; *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. at 744-45; *Alexander* v. *Gardner-Denver Co.*, 415 U.S. at 53-54.

the beneficial role of arbitration in the resolution of such controversies. The Court concluded that "the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated" in the collective bargaining context by making available remedies under both the arbitration provision of a collective-bargaining agreement and a cause of action under Title VII. *Id.* at 59-60. "The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate" in the subsequent judicial proceedings. *Id.; see also McDonald* v. *City of West Branch,* 466 U.S. at 292, n.13 (same); *Barrentine* v. *Arkansas-Best Freight System, Inc.,* 450 U.S. at 743, n.22 (same).

Contrary to this clear mandate, the Court of Appeals in this case eliminated any role for arbitration in the resolution of Title VII claims and, thus, failed to adhere to the procedure established by this Court for accommodating the federal policies favoring the enforcement of private arbitration agreements and prohibiting unlawfully discriminatory employment practices. In failing to enforce respondent's agreement to arbitrate her employment discrimination claims, at least in the first instance, the Court of Appeals misconstrued this Court's labor arbitration decisions and disregarded the strong national policy favoring such arbitration. The Court should grant this petition for a writ of certiorari and reverse the Court of Appeals' decision in order to correct this misapplication of its precedents and to accommodate the federal interests underlying the FAA to those underlying Title VII.

Moreover, if the Court grants this petition, it would have the opportunity to clarify the distinction established in its decisions between labor arbitration pursuant to a collective-bargaining agreement and private arbitration of statutory

claims under the FAA. The lower federal courts have rendered conflicting opinions as to whether the Court's labor arbitration cases preclude enforcement of private agreements to arbitrate disputes under Title VII and other federal statutes. A number of courts have refused to follow this Court's decisions in *Mitsubishi, McMahon* and *Rodriguez* and have relied upon this Court's labor arbitration opinions in *Alexander, Barrentine* and *McDonald* to decline to enforce under the FAA otherwise valid arbitration agreements in cases asserting statutory claims.[6] Other courts have upheld the arbitrability of such claims in accordance with this Court's recent arbitration jurisprudence.[7]

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[6] *See e.g., Nicholson* v. *CPC Int'l Inc.*, 877 F.2d 221 (3d Cir. 1989) (claim under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* ("ADEA")); *Bird* v. *Shearson Lehman/American Express, Inc.*, 871 F.2d 292 (ERISA claim); *Swenson* v. *Management Recruiters Int'l, Inc.*, 858 F.2d 1304 (8th Cir. 1988), *reh'g denied*, 872 F.2d 264 (1989), *cert. denied*, 110 S. Ct. 143 (1989) (claim under Minnesota Human Rights Act, Minn. Stat. § 363.03); *Barrowclough* v. *Kidder, Peabody & Co.*, 752 F.2d 923 (3d Cir. 1985) (ERISA claim); *Alford* v. *Dean Witter Reynolds, Inc.*, 712 F. Supp. 547 (S.D. Tex. 1989) (Title VII claim); *Gilmer* v. *Interstate/Johnson Lane Corp.*, No. 88-0396, slip op. (W.D.N.C. Jan. 17, 1989), *app. pending*, No. 88-1796 (4th Cir.) (ADEA claim); *Jones* v. *Baskin, Flaherty, Elliot and Mannino*, P.C., 670 F. Supp. 597 (W.D. Pa. 1987) (ADEA claim); *Steck* v. *Smith Barney, Harris Upham & Co.*, 661 F. Supp. 543 (D.N.J. 1987) (ADEA claim); *DeSapio* v. *Josephthal and Co.*, 143 Misc. 2d 611, 540 N.Y.S.2d 932 (Sup. Ct. 1989) (claim under Section 296 of New York Human Rights Law, N.Y. Exec. Law § 296).

[7] *See Arnulfo P. Sulit, Inc.* v. *Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988) (ERISA claim); *Steele* v. *L.F. Rothschild & Co.*, 701 F. Supp. 407 (S.D.N.Y.), *app. dismissed*, 864 F.2d 1 (2d Cir. 1988) (claim under Equal Pay Act of 1963, 29 U.S.C. § 206(d)), *Garfield* v. *Thomson McKinnon Securities, Inc.*, No. 88-3027, slip op. (N.D. Ill. Dec. 16, 1988) (ADEA claim); *Walsh* v. *UBS Securities, Inc.*, No. 88-4600, slip op. (S.D.N.Y. Oct. 5, 1988) (ADEA claim); *Pihl* v. *Thomson McKinnon Securi-*

(footnote continued on following page)

The guidance of this Court is required if the lower courts are properly to apply its FAA arbitration decisions to this and similar statutory disputes. The Court of Appeals acknowledged that this Court's decisions require evidence of a specific congressional intent to withdraw respondent's claim from arbitration. Finding none, it erroneously held the claim non-arbitrable because it involves rights of the sort that have "historically been the sole province of Article III adjudication." *Utley* v. *Goldman Sachs & Co.*, 883 F.2d at 187. This Court's direction is therefore necessary to ensure the enforceability and reliability of individually-accepted arbitration commitments, and, in the interest of reducing the overcrowded dockets of the federal courts, to give arbitration a chance to resolve disputes that the parties have agreed to resolve in that forum—a forum that this Court has repeatedly held to be adequate to the task.

(footnote continued from preceding page)

ties, Inc., 48 Fair Empl. Prac. Cas. (BNA) 922 (E.D. Pa. 1988) (ADEA claim); *Bruno* v. *Prudential-Bache Securities, Inc.*, No. E005087, slip op. (Cal. Ct. App. filed Nov. 28, 1988) (claim under California anti-discrimination statute, Cal. Gov't Code § 12940). *See also Nicholson* v. *CPC Int'l Inc.*, 877 F.2d at 231 (Becker, J., dissenting); *Bird* v. *Shearson Lehman/American Express, Inc.*, 871 F.2d at 298 (Cardamone, J., dissenting).

CONCLUSION

For all of the foregoing reasons, petitioners respectfully request the Court to issue a writ of certiorari in this case to review and reverse the decision of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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November 21, 1989

APPENDIX A

Opinion of the Court of Appeals for the First Circuit

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 89-1218

KRISTINE UTLEY,

Plaintiff, Appellee,

v.

GOLDMAN SACHS & COMPANY, *et al.*,

Defendants, Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Mark L. Wolf, *U.S. District Judge*]

Before

Bownes and Selya, *Circuit Judges,*
and Harrington,* *District Judge.*

THEODORE EDELMAN with whom JOHN F. CANNON, SULLIVAN & CROMWELL, DOUGLAS F. SEAVER, STEWART A. BRODER and GASTON & SNOW were on brief for appellants.

RICHARD D. GLOVSKY with whom MELINDA MILBERG, DANIEL S. TARLOW and GLOVSKY & ASSOCIATES were on brief for appellee.

AUGUST 23, 1989

* Of the District of Massachusetts, sitting by designation.

Opinion of the Court of Appeals for the First Circuit

HARRINGTON, *District Judge*. Goldman, Sachs & Co., Goldman Sachs Money Market Inc. ("GSMMI"), David Ford and Frank Gaul, defendants-appellants, appeal from the district court's denial of their motion for a stay of all proceedings pending arbitration of plaintiff, Kristine Marie Utley's Title VII claims. The district court (Wolf, J.) denied defendants' motions, based upon the United States Supreme Court decision of *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), which ruled that an individual cannot prospectively waive judicial remedies for a violation of Title VII. Defendants filed an appeal urging this Court, at the very least, to enforce the arbitration agreement between them and the plaintiff, before allowing Ms. Utley to proceed with her Title VII claims in a judicial forum. For the reasons set forth, we affirm the district court.

Plaintiff began her employment with Goldman Sachs as a fixed income sales trainee in the New York office during July of 1985. Goldman, Sachs & Co. is an investment banking firm and broker-dealer and a member of numerous securities exchanges, including the New York Stock Exchange, Inc. Around February 10, 1986 she was assigned to the Money Market Department of the Boston office of GSMMI, where she was the only woman sales associate in the Department. In the fall of 1987, a supervisor, Mr. Paul Gaul, asked the plaintiff to consider a transfer to the New York office. The plaintiff believed that she was singled out for transfer on the basis of her sex, and both parties engaged the assistance of counsel. Appellee's Brief at 5. When Ms. Utley refused to accept the transfer, she was terminated.

Plaintiff filed timely complaints with the Massachusetts Commission against Discrimination and the Equal Employ-

ment Opportunity Commission alleging sexual harassment and sex discrimination. On December 6, 1987, she filed a Complaint in Massachusetts Superior Court.[1] On April 6, 1988, the plaintiff filed an action in the United States district court for the District of Massachusetts alleging that her rights under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. sec. 2000e-2 *et seq.* ("Title VII") were violated. In her Complaint, plaintiff alleged that she was subjected to a hostile working environment in which women were demeaned. She also alleged that defendants' efforts to transfer her to New York and their decision to terminate her employment constituted acts of discrimination on account of her sex. The defendants moved the district court, pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. sec. 3, for an Order staying all proceedings in district court pending the completion of arbitration.

Defendants claimed that arbitration was mandated by Utley's execution of a Uniform Application for Securities Industry Registration or Transfer ("Form U-4"), which stated that she agreed to arbitrate any dispute which arose

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[1] The Complaint consisted of eight counts, including allegations of sexual harassment and discrimination in violation of G.L.M. c. 151B; violation of G.L.M. c. 12 sec. 11I; and wrongful termination. Defendants moved to dismiss, or in the alternative, to stay the state proceedings on the grounds that plaintiff had agreed to arbitrate all claims. After an appeal of the superior court's denial of these motions, the case was remanded to superior court for a determination of the agreement's validity, and a determination of which claims, if any, were arbitrable. The superior court (Rouse, J.) held that the arbitration agreement was valid, and that the plaintiff must arbitrate her contract and tort claims. The court ruled that the plaintiff could pursue her sex discrimination and civil rights claims in the judicial forum. *Utley* v. *Goldman Sachs & Co. et al.*, CA 87-6735 (Mass. Sup. Ct., May 26, 1989) (Memorandum and Order denying Defendants' Motion to Compel Arbitration).

between her and her firm.[2] The plaintiff opposed defendants' motions on the grounds, *inter alia*, that plaintiff's Title VII claim is not referable to arbitration under the FAA.

In *Alexander* v. *Gardner-Denver*, the Supreme Court ruled that, despite a collective bargaining agreement to arbitrate all disputes, an employee could not prospectively waive his or her right to a judicial forum on an employment discrimination claim. While acknowledging the existence of a strong federal policy in favor of arbitration, the Court determined that the scheme of Title VII placed ultimate responsibility for its enforcement with federal courts, gave them "plenary powers" to secure compliance, 415 U.S. at 45, and determined that deferral to arbitral decisions would conflict with that rule. *Id.* at 56.

The Court further decided that the legislative history of Title VII "manifests a Congressional intent to allow an individual to pursue *independently* his rights under both Title VII and other applicable state and federal statutes." *Id.* at 48, and n.9 (emphasis added). The Court also noted that the "choice of forums inevitably affects the scope of the substantive right to be vindicated" *id.* at 56 (citing *U.S. Bulk Carriers* v. *Arguelles*, 400 U.S. 351, 359-360 (1971), (Harlan, J., concurring)), and concluded that "federal policy was best accommodated by permitting an employee to pursue fully remedies under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII." *Id.* at 59-60. The Court never directly addressed whether arbitration must precede a

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[2] Ms. Utley disputes the validity of at least one of two Form U-4 agreements. We form no opinion about its validity, except to assume for the purposes of this opinion that it was a valid agreement.

judicial remedy but a reasonable inference from the Court's use of such language as, "permitting an employee" and "allowing an individual" to pursue both remedies is that it was not intended to mandate arbitration of Title VII claims before proceeding to a judicial forum.

In decisions following *Alexander*, the Court effectively developed a presumption of arbitrability under the FAA. *See Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (burden is on party opposing arbitration to show Congressional intention to preclude waiver of judicial remedies); *see also, Shearson/American Express Inc.* v. *McMahon*, 107 S. Ct. 2332, 2337 (1987); (FAA, 9 U.S.C. § 1 *et seq.* (1982) establishes a " 'federal policy favoring arbitration' ") (quoting *Moses H. Cone Memorial Hosp.* v. *Mercury Construction Corp.*, 460 U.S. 1, 24 (1983)); *Rodriguez de Quijas* v. *Shearson/American Express Inc.*, 57 USLW 4539 (1989) (overruling *Wilko* v. *Swan*, 346 U.S. 427 (1953), and holding that arbitration agreements are enforceable as to claims under section 12(2) of the Securities Act of 1933).

Notwithstanding this policy, however, the Court has done nothing to disturb its prior ruling in *Alexander* that arbitration agreements do not preclude an independent right of access to a judicial forum for resolution of Title VII claims. In fact, none of the recent pro-arbitration decisions by the Supreme Court involve employment discrimination claims. *See Swenson* v. *Management Recruiters International, Inc.*, 858 F.2d 1304, 1306-7 (8th Cir. 1988). The reason for this is the congressional intent behind Title VII. The presumption of arbitrability under the FAA will be defeated when it is "overriden by a contrary congressional command"

in another statute. *Shearson,* 107 S. Ct. at 2337. The Court permits exceptions to enforcement of arbitration agreements when "Congress . . . has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi,* 473 U.S. at 627-28. *See also, McDonald* v. *City of West Branch,* 466 U.S. 284, 289. Congress has shown such an intention with regard to Title VII.

In this circuit the court has articulated previously that the proper inquiry regarding arbitrability under *Mitsubishi* is one of Congressional intent. *Page* v. *Moseley, Hallgarten, Estabrook, and Weeden, Inc.,* 806 F.2d 291, 300 (1st Cir. 1986). We have stated that we would not preclude arbitration of federal statutory rights unless we found that Congress, either implicitly or explicitly, intended otherwise. *Id.* at 297. In *Page,* we distinguished Title VII actions under *Alexander* from the general rule favoring arbitrability, noting that Title VII "contained an express private right of action, . . . and involved adjudication of the rights of an individual under the Constitution, an inquiry that, with all due respect to arbitration, has historically been the sole province of Article III adjudication." *Id.*

That reasoning, based upon a recognition of Title VII's unique nature, continues to be valid today. The fact that Ms. Utley signed an individual employment agreement rather than a collective bargaining agreement as in *Alexander* is not significant. Similarly, defendants' attempts to read into *Alexander* and its progeny a requirement for employees to participate in arbitration prior to initiating claims in a judicial forum is inconsistent with the Congressional intent behind Title VII. As Congress has made the policy against discrimination "a highest priority," *Alex-*

ander, 415 U.S. at 47, we rule that an employee cannot waive prospectively her right to a judicial forum at any time, regardless of the type of employment agreement which she signs.

Further support for this conclusion can be found in the Eighth Circuit decision of *Swenson* v. *Management Recruiters International, Inc.*, 858 F.2d 1304 (8th Cir. 1988). *Swenson* involved a cause of action by an employee against her former employer and her former supervisor, alleging *inter alia*, sex discrimination in violation of a Minnesota statute. The district court stayed the judicial proceedings pending arbitration of all issues pursuant to the FAA. The Court of Appeals reversed. Although that decision involved a question of preemption of state judicial remedies by the FAA, the Court carefully considered whether the FAA preempted federal judicial remedies for violations of Title VII.

As stated by the *Swenson* Court,

> We conclude that in the passage of Title VII it was the Congressional intent that arbitration is unable to pay sufficient attention to the transcendent public interest in the enforcement of Title VII. Title VII mandates the promotion of the public interest by assisting victims of discrimination. The arbitration process may hinder efforts to carry out this mandate. *Id.* at 1307.

We find this analysis compelling.

To summarize our opinion, the text of Title VII, while promoting conciliation and informal resolution, does not mandate exhaustion of arbitration before allowing an employee to proceed to a judicial forum. Furthermore, Title

VII's statutory scheme and its legislative history clearly point to the conclusion that Congress intended to preclude even a temporary prospective waiver of judicial forum. Therefore, Ms. Utley cannot be required to participate in arbitration proceedings prior to a judicial hearing on her Title VII claims.

Additionally, we hold that the district court acted within its discretion when it declined to stay this action pending the resolution of state court proceedings. The decision to stay litigation of non-arbitrable claims is one left to the district court as a matter of discretion to control its docket. *See Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. at 20 n.23. *See also, Sevinor* v. *Merrill Lynch, Pierce, Fenner & Smith*, 807 F.2d 16, 20 (1st Cir. 1986).

The Order of the district court is AFFIRMED.

APPENDIX B

Memorandum and Order of the United States District Court for the District of Massachusetts

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

C.A. 88-794-WF

KRISTINE UTLEY,

Plaintiff,

v.

GOLDMAN, SACHS & CO., *et al.*,

Defendants.

MEMORANDUM AND ORDER

WOLF, D.J. January 17, 1989

Defendants have moved for a stay pending arbitration of plaintiff's claim of sex discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) *et. seq.* Plaintiff opposes this request. The motion must be denied.

This conclusion is compelled by the Supreme Court's decision in *Alexander* v. *Gardner-Denver,* 415 U.S. 36, (1973). There, as here, the controversy in question was subject to an agreement to submit all disputes to arbitration. *Id.* at 40. Indeed, in contrast to the instant case, in *Alexander* the claim of discrimination had been presented to an arbitrator and rejected before the Title VII claim was asserted in federal court. Yet, the Supreme Court unanimously rejected the contention that the Title VII claim

could not still be litigated, finding: that responsibility for enforcement of Title VII is vested with the federal courts, *id.* at 44; that Title VII was designed to supplement rather than supplant existing laws *and institutions* relating to employment discrimination, *id.* at 48-9 (emphasis added); and there can be no prospective waiver of an employee's rights to litigate under Title VII in the form of a broad agreement to arbitrate employment disputes, *id.* at 51.

Accordingly, defendants' motion to stay is hereby DENIED. All discovery shall be completed by September 15, 1989.

January 17, 1989

/s/ MARK L. WOLF
United States District Judge

APPENDIX C

Judgment of the Court of Appeals for the First Circuit

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 89-1218

KRISTINE UTLEY,

Plaintiff, Appellee,

v.

GOLDMAN SACHS & COMPANY, *et al.*,

Defendants, Appellants.

JUDGMENT

Entered: August 23, 1989

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

FRANCIS P. SCIGLIANO

Clerk.

APPENDIX D

Statutory Provisions Involved

TITLE 9 OF THE UNITED STATES CODE

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

(July 30, 1947, ch. 392, 61 Stat. 670.)

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

(July 30, 1947, ch. 392, 61 Stat. 670.)

Statutory Provisions Involved

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue

or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

TITLE 42 OF THE UNITED STATES CODE

§ 2000e-5. *Enforcement provisions*

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee con-

trolling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its deter-

mination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a)[1] of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

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[1] So in original. Probably should be subsection "(b)".

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency

A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon

receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the

Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or

(d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to

the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(h) Provisions of chapter 6 of title 29 not applicable to civil actions for prevention of unlawful practices

The provisions of chapter 6 of title 29 shall not apply with respect to civil actions brought under this section.

(i) Proceedings by Commission to compel compliance with judicial orders

In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals

Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, title 28.

(k) Attorney's fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

(Pub. L. 88-352, Title VII, § 706, July 2, 1964, 78 Stat. 259; Pub. L. 92-261, § 4, Mar. 24, 1972, 86 Stat. 104.)

FEDERAL RULES OF CIVIL PROCEDURE

Rule 53. Masters.

(a) Appointment and Compensation. The court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor, an examiner, and an assessor. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct; provided that this provision for compensation shall not apply when a United States magistrate is designated to serve as a master pursuant to Title 28, U.S.C. § 636(b)(2). The master shall not retain the master's report as security for the master's compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury,

a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it. Upon the consent of the parties, a magistrate may be designated to serve as a special master without regard to the provisions of this subdivision.

(c) Powers. The order of reference to the master may specify or limit the master's powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order. The master may require the production before the master of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. The master may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in the Federal Rules of Evidence for a court sitting without a jury.

(d) Proceedings.

(1) ***Meetings.*** When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make the report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in the master's discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) ***Witnesses.*** The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, the witness may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

(3) ***Statement of Accounts.*** When matters of accounting are an issue before the master, the master may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items

thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as the master directs.

(e) Report.

(1) *Contents and Filing.* The master shall prepare a report upon the matters submitted to the master by the order of reference and, if required to make findings of fact and conclusions of law, the master shall set them forth in the report. The master shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) *In Jury Actions.* In an action to be tried by a jury the master shall not be directed to report the evidence. The master's findings upon the issues submitted to the master are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon

any objections in point of law which may be made to the report.

(4) ***Stipulation as to Findings.*** The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) ***Draft Report.*** Before filing the master's report, a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

(f) A magistrate is subject to this rule only when the order referring a matter to the magistrate expressly provides that the reference is made under this Rule.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987.)

(2)

No. 89-802.

Supreme Court, U.S.
FILED
DEC 22 1989
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CLERK

In the
Supreme Court of the United States.

OCTOBER TERM, 1989.

GOLDMAN, SACHS & CO.,
GOLDMAN SACHS MONEY MARKETS, INC.,
DAVID B. FORD AND FRANCIS J. GAUL, JR.,
PETITIONERS,

v.

KRISTINE M. UTLEY,
RESPONDENT.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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December 21, 1989

BOSTON, MASSACHUSETTS

44 pp

QUESTION PRESENTED

Whether the Court of Appeals was correct in ruling that Congress intended to preclude even a temporary prospective waiver of a judicial forum under Title VII of the Civil Rights Act of 1964 ("Title VII") and that arbitration is inherently inconsistent with the underlying purposes of Title VII.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No. 89-802

GOLDMAN, SACHS & CO.,
GOLDMAN SACHS MONEY MARKETS, INC.,
DAVID B. FORD and FRANCIS J. GAUL, JR.,

Petitioners

- against -

KRISTINE M. UTLEY,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Respondent Kristine M. Utley ("Ms. Utley"), plaintiff below, respectfully opposes the petition for a writ of certiorari to the United States Court of

Appeals for the First Circuit (the "Court of Appeals"), filed by petitioners Goldman, Sachs & Co. ("Goldman Sachs"), Goldman Sachs Money Markets Inc. ("GSMMI"), David B. Ford ("Ford") and Francis J. Gaul, Jr. ("Gaul") (collectively referred to as the "petitioners"), defendants below.

STATUTORY PROVISIONS INVOLVED

Ms. Utley disagrees that Rule 53 of the Federal Rules of Civil Procedure is a statutory or regulatory provision involved in this case within the meaning of Rule 21.2(f) of the Rules of the Supreme Court of the United States. Ms. Utley otherwise agrees with petitioners' statement of the statutory provisions involved.

STATEMENT OF THE CASE

Ms. Utley began her employment with Goldman as a sales associate on or about July 8, 1985. On or about February 10, 1986, she was assigned to the Money Market Department ("Department") of the Fixed Income Division ("Division") of the Boston office of GSMMI, where she was the only woman sales associate in the Department. Her employment was abruptly terminated on the eve of Thanksgiving, November 25, 1987.

During her tenure in the Department, Ms. Utley contends that the working environment to which the she was subjected was hostile, intimidating and sexist. Materials which demean and disparage women were circulated through the Division. These materials included announcements with

photographs of women exposing naked breasts substituted for the actual pictures of new female employees.

On or about November 12, 1987, Ms. Utley was asked by petitioner Gaul to consider a transfer to New York, even though any one of the men in Ms. Utley's department was at least equally qualified to fulfill the responsibilities of the job to which she was asked to consider being transferred. Subsequently, Gaul told Ms. Utley that the fact that she handled some of the Hartford-based accounts being transferred to New York was of only "slight" importance in the decision to ask her to transfer her to New York.

Gaul thereafter announced at a staff meeting, without previously asking anyone else to transfer to New York, that Ms.

Utley would likely be moving to New York; Ms. Utley informed the petitioners that she did not wish to be transferred, and requested that they find another solution. Ms. Utley believes she was singled out for transfer on the basis of her sex. Upon information and belief, soon after Ms. Utley was terminated, Goldman hired two male sales associates to be assigned to the Boston office Fixed Income Division. Ms. Utley maintains she could easily have been reassigned to one of the positions being filled by the two male sales associates hired soon after her termination.

After both Ms. Utley and Goldman had engaged counsel with regard to her claims of discrimination, petitioners unlawfully pressured Ms. Utley to speak to the petitioners directly regarding these matters. Despite Ms. Utley's objections to

discussing the proposed transfer without her counsel present, petitioner Ford insisted on speaking with her, and did so on November 25, 1987. During this conversation, Ford abruptly terminated Ms. Utley.

As a condition of her employment with Goldman, Ms. Utley was required to register with the New York Stock Exchange ("NYSE") as a General Securities Representative. In particular, Ms. Utley was required to, and did, execute a "Uniform Application for Securities Industries Registration or Transfer" ("Form U-4") soon after starting her employment with Goldman. The petitioners allege that Ms. Utley was required to, and did, execute a second Form U-4 when she began her employment with GSMMI.

On the last page of the Form U-4, buried in small print, there is a clause which reads as follows:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register, as indicated in item 10.

Item 10 of the "second" Form U-4 requests registration with the NYSE and other self-regulatory organizations ("SRO").

On November 27, 1987, Ms. Utley filed a complaint with the Massachusetts Commission Against Discrimination and the Equal Employment Opportunity Commission alleging sexual harassment and sex discrimination.

On December 6, 1987, Ms. Utley filed a complaint in Massachusetts Superior Court,

in the County of Suffolk. The Complaint consisted of eight counts, including allegations relating to sexual harassment and discrimination in violation of G.L.M. c. 151B and of G.L.M. c. 12 §11I; and wrongful termination. Petitioners moved to dismiss, or alternatively to stay the proceedings on the ground that Ms. Utley allegedly agreed to arbitrate her claims in accordance with the Constitution, Rules and By-Laws of the New York Stock Exchange. The petitioners' motion was denied by the Massachusetts Superior Court. On May 26, 1989, after remand from the Appeals Court of Massachusetts, the Massachusetts Superior Court entered an order granting petitioners' Motion to Stay with respect to Ms. Utley's common law claims and denying the motion with respect to her state

statutory discrimination and civil rights claims.

On March 22, 1988 Ms. Utley received a Notice of Right to Sue from the EEOC. Thereafter, on April 5, 1988, Ms. Utley filed this federal court action against the petitioners under Title VII of the Civil Rights Act as amended, 42 U.S.C. §2000e-1 et. seq. ("Title VII").

On April 26, 1988, the petitioners filed a Motion for a Stay in which they requested the District Court to stay Ms. Utley's federal court action pending arbitration. The District Court by a Memorandum and Order dated January 17, 1989 denied petitioner's Motion For a Stay. The District Court concluded that the Supreme Court's decision in Alexander v. Gardner-Denver, 415 U.S. 36 (1973), compelled the

decision that Title VII claims are not arbitrable.

On February 3, 1989, the petitioners appealed the District Court's decision to the United States Court of Appeals for the First Circuit. On August 23, 1989, the Court of Appeals affirmed the decision of the District Court. The Court of Appeals held that "Congress intended to preclude even a temporary waiver of a judicial forum." Utley v. Goldman Sachs & Company, et al, 883 F.2d 184, 187 (1989). In addition, the Court of Appeals held that the "District Court acted within its discretion when it declined to stay this action pending resolution of the State Court proceedings." Id. at 187.

The Court of Appeals recognized that in Alexander v. Gardner-Denver Co., 415

U.S. 36, this Court ruled that "arbitration agreements do not preclude an independent right to access to a judicial forum for resolution of Title VII claims." Utley, 883 F.2d at 186. Moreover, the Court of Appeals found that Alexander had not been disturbed by such of this Court's decisions under the Federal Arbitration Act, 9 U.S.C. §1 et seq. ("FAA") following Alexander as Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987), and Rodriguez De Quijas v. Shearson/American Express, Inc., 109 S.Ct. 1917 (1989). 883 F.2d at 186. Rather, the Court of Appeals noted that none of these decisions involved discrimination claims. Id. at 186.

Furthermore, the Court of Appeals noted that this Court's decisions involving the FAA recognize that the presumption of arbitrability under the FAA is "defeated when it is 'overridden by a contrary congressional command'. Id. at 186 (quoting Shearson, 482 U.S. at 226. The Court of Appeals concluded that Congress had expressed just such an intent with regard to Title VII. In particular, the Court of Appeals found, in the words of Alexander, that Congress had made the policy against discrimination a "highest priority." Id. at 187. Further, the Court of Appeals found that Title VII 'involved the adjudication of the rights of an individual under the constitution, an inquiry that, with all due respect to arbitration, has historically been the sole

province of Article III adjudication. Id. at 187 (citation omitted).

Finally, the Court of Appeals concluded that Alexander was not limited to situations involving collective bargaining agreements. Id. at 187. In short, the Court of Appeals concluded that neither Alexander nor this Court's decisions under the FAA required an employee to go to arbitration before going to Court. Id. at 187.

REASONS WHY A WRIT SHOULD NOT BE GRANTED

I. INTRODUCTION.

Rule 17 of the Rules of the Supreme Court states that "review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted

only when there are special and important reasons therefor." Sup. Ct. R. 17.1. Rule 17 goes on to enumerate several reasons, not exclusive, for which this Court will grant a writ of certiorari. Only three of these reasons could conceivably apply to the instant case: (1) a conflict between the Federal Courts of Appeals, Sup. Ct. R. 17.1(a); (2) an important and unsettled question of federal law, Sup. Ct. R. 17.1(c); or (3) a conflict with applicable decisions of the Supreme Court, Sup. Ct. R. 17.1(c).

Here, as the petitioners admit, there is no conflict between the federal courts of appeals on the question presented (i.e., whether Congress intended to preclude a waiver of a judicial forum for Title VII claims). In fact, the only other federal

court of appeals to directly confront the question reached the same conclusion as the court of appeals in the instant case. Swenson v. Management Recruiters International, Inc., 858 F.2d 1304, 1307 (8th Cir. 1988) reh'g denied 872 F.2d 264 (1989), cert. denied, 110 S.Ct. 143 (1989).[1]

The petition does not present an unsettled question of federal law. See, S. Ct. R. 17.1(c). While the question of the arbitrability of Title VII claims is an important one, in order to meet the standard set forth in Rule 17.1(c), the

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[1] In addition, it is worth noting that the only United States District Court, other than the United States District Court for the District of Massachusetts in this case, to directly confront this issue also reached the same conclusion as the Court of Appeals in the instant case. See Alford v. Dean Witter Reynolds, Inc., 712 F.Supp. 547, 549 (S.D. Tex. 1989) (Title VII claims are not subject to compulsory arbitration).

question of law presented by a petition should also be one of first impression which has not been, but should be, settled by this Court. See, 13 J. Moore, H. Bendix, and B. Ringle, Moore's Federal Practice, ¶817.41 (1988). The question presented in the instant case, however, has already been settled by this Court in Alexander. In Alexander, this Court held that Congress intended to preclude a waiver of judicial remedies for Title VII claims. 415 U.S. at 51-52. Moreover, while the Court in Alexander did not directly confront the issue of whether an employee can be compelled to arbitrate in the first instance, it is a clear inference from this Court's opinion in Alexander that an employee cannot be so compelled. Id. at 49, 55, 59-60. In addition, despite

petitioners' assertions to the contrary, the Alexander decision was not limited to situations involving collective bargaining agreements. The well-springs of the Alexander decision were not the peculiarities of the collective bargaining setting, but rather the Congressional intent to preclude a prospective waiver of a judicial forum for Title VII claims, and the relative inadequacy of the arbitral forum to decide such matters. Id. at 51-52 and 56.

Finally, as related above, the Court of Appeals' decision does not conflict with this Court's decisions under the FAA subsequent to Alexander, none of which involved discrimination claims. See, e.g., Rodriguez De Quijas, 109 S.Ct. 1917; McMahon, 482 U.S. 220; and Mitsubishi, 473

U.S. 614. Furthermore, this Court's decisions under the FAA have all recognized that the presumption favoring arbitration under the FAA can be overridden as to statutory claims where Congress has evinced an intent to preclude the waiver of a judicial forum or when there is an inherent conflict between the policy underlying the statutory claims and the policy favoring arbitration. See, Mitsubishi, 473 U.S. at 627-628; McMahon, 482 U.S. at 226; and Rodriguez De Quijas, 109 S.Ct. at 1921. As stated above, in Alexander, this Court found just such an intent on the part of Congress and just such a conflict between the policy underlying Title VII and the policy favoring arbitration.

Thus, the petitioners have failed to meet the standard for granting certiorari under Rule 17.

II. THE COURT SHOULD NOT GRANT A WRIT BECAUSE IT IS SETTLED THAT TITLE VII CLAIMS ARE NOT SUBJECT TO COMPULSORY ARBITRATION AND THE COURT OF APPEALS' DECISION IS IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT.

Although petitioners attempt to enlarge the issue in this case to encompass statutory remedies other than Title VII, the question before this Court is whether the Court of Appeals correctly applied this Court's decisions in concluding that Title VII claims are not subject to compulsory arbitration. Ms. Utley submits that the Court of Appeals correctly construed this Court's decision in Alexander as well as its decisions under the FAA in concluding that Title VII claims are not subject to compulsory arbitration.

Petitioners acknowledge that the proper test to be applied in determining whether an arbitration agreement will be held to cover statutory remedies is whether Congress has evinced an intent to preclude the waiver of judicial remedies for the statutory rights at issue or whether there is an inherent conflict between the policy underlying the statutory claims and the policy favoring arbitration. Mitsubishi, 473 U.S. at 627-628; and McMahon, 482 U.S. at 227.

Ample authority exists for the proposition that Congress intended to preclude a waiver of judicial remedies for violations of Title VII. Alexander, 415 U.S. at 51-52; Swenson, 858 F.2d at 1305. See, also, Sape & Hart, Title VII Reconsidered: The Equal Opportunity Act of

1972, 40 Geo. Wash. L. Rev. 824, 879, text and notes 355-357 (1972) (citing to 1971 Hearings 48, 125, 208, 238; H.R.Rep. No. 238, at 11-13; S. Rep. No. 415, at 23-24; and 118 Cong. Rec. S.2301 (daily ed. Feb. 22, 1972)).

This Court has recently reaffirmed the principle that individuals should not be barred from bringing claims under federal statutes designed to protect civil rights. In Lingle v. Norge Div. of Magic Chef, Inc., 108 S.Ct. 1877, 1884 (1988), the Court, quoting from Atchison, T. & S.F.R. Co. v. Buell, 480 U.S. 557, 564-565 (1987) said:

> "This Court has, on numerous occasions, declined to hold that individual employees are, because of the availability of arbitration, barred from bringing claims under federal statutes. See, e.g., McDonald v. West Branch, 466 U.S. 284 [104 S.Ct. 1799, 80 L.Ed.2d 302] (1984); Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 [101 S.Ct.

> 1437, 67 L.Ed.2d 641] (1981); Alexander v. Gardner-Denver Co., 415 U.S. 36 [94 S.Ct. 1011, 39 L.Ed.2d 147] (1974). Although the analysis of the question under each statute is quite distinct, the theory running through these cases is that notwithstanding the strong policies encouraging arbitration, 'different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.' Barrentine, supra, 450 U.S. at 737 [101 S.Ct. at 1443]." Atchison, T. & S.F.R. Co. v. Buell, 480 U.S. __, __, 107 S.Ct. 1410, 1415, 94 L.Ed.2d 563 (1987) (emphasis added).

Petitioners' position seems to leave no room to find any statutory rights exempt from compulsory arbitration. Clearly, this position is untenable and is in itself in conflict with this Court's decisions.

In fact, Ms. Utley contends that, taken as a whole, this Court's rulings draw a distinction between claims based upon statutes protecting individual rights and

claims based upon business or purely commercial transactions. Thus, in cases involving individual rights, the Court has found a Congressional intent to preclude waiver of judicial remedies. Barrentine v. Arkansas - Best Freight Systems, 450 U.S. 728 (1981) (Fair Labor Standards Act of 1938, 29 U.S.C. §201 et. seq.); McDonald v. City of West Branch, Michigan; 466 U.S. 284 (1984) (claims under 42 U.S.C. §1983); and Alexander v. Gardner-Denver. Compare, Rodriquez De Quijas, 109 S.Ct. 1917 (dispute between investors and brokerage firm under Securities Act of 1933, 15 U.S.C. §77 et. seq.); McMahon, 482 U.S. 220 (dispute between investors and brokerage firm under Securities Act of 1934, 15 U.S.C. §78a et. seq. and Racketeer Influenced and Corrupt Organizations Act

("RICO"), 18 U.S.C. §1961 et. seq.); and Mitsubishi, 473 U.S. 614 (anti-trust dispute under federal anti-trust laws, 15 U.S.C. §1 et. seq.). The Courts of Appeals and District Courts have made a similar distinction. Nicholson v. CPC International, Inc., 877 F.2d 221 (3d Cir. 1989) (Age Discrimination in Employment Act, 29 U.S.C. §621 et. seq. claim); Coppinger v. Metro-North Commuter Railroad, 861 F.2d 33 (2d Cir. 1988) (42 U.S.C. §1983 claim); Swenson v. Management Recruiters International, Inc., 858 F.2d 1304 (8th Cir. 1988) (Title VII claims); and Alford v. Dean Witter Reynolds, Inc., 712 F.Supp. 547 (S.D.Tex. 1989) (Title VII claims). Compare, Arnulfo P. Sulit v. Dean Witter Reynolds, Inc. 847 F.2d 475 (8th Cir. 1988) (Employment Retirement Income

Security Act of 1974, 29 U.S.C. §1001 et seq. claim).[2] In short, "[d]iscrimination and civil rights legislation have traditionally been viewed differently than purely private economic disputes." Swenson, 858 F.2d at 1306. In addition, the Court of Appeals for the First Circuit was correct in finding that under the second prong of the Mitsubishi and McMahon test, there is an inherent conflict between the underlying purposes of Title VII and the policy of the FAA favoring arbitration. The Supreme Court in Alexander discussed at length the reasons why arbitration is an inappropriate forum for resolving Title VII claims. 415 U.S. at 56-58; see, also,

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[2] Ms. Utley notes that this Court was recently presented with the same issue presented in this case in a Petition For a Writ of Certiorari filed by Management Recruiters in the Swenson case. This Court denied certiorari in Swenson. 110 S.Ct. 143 (1989).

McDonald, 466 U.S. at 290-91; Barrentine, 450 U.S. at 743-45. While some of the reasons expressed by the Court in Alexander apply only to grievance arbitration under a collective bargaining agreement, serious concerns evinced by the Court apply as well to the arbitration of employment discrimination disputes before the New York Stock Exchange.

For example, in Alexander the Court noted that "the fact finding process in arbitration usually is not equivalent to judicial fact finding." 415 U.S. at 57. In this case, Ms. Utley's claims would be arbitrated under rules applicable to the securities industry. The New York Stock Exchange Rules reveal that there is limited discovery, the usual rules of evidence do

not apply, no record is kept unless requested by the parties, and written reasons for a decision need not be given. New York Stock Exchange, Inc., Rule 601 et. seq., 2 New York Stock Exchange Guide (CCH) ¶2601 et. seq. The restrictions on discovery, including the fact that there is no provision for depositions, are particularly detrimental to a claimant's ability to prove an employment discrimination claim where the information necessary to prove a case is often in the hands of the employer. See, e.g., Rich v. Martin Marietta, 522 F.2d 333, 343-344 (10th Cir. 1975). Also, the relief available from an arbitral panel convened by the New York Stock Exchange does not include equitable relief, the availability

of which is an essential part of the remedial scheme under Title VII. Cf., Nicholson, 877 F.2d at 228. Nor can a claimant under the New York Stock Exchange arbitration rules recover attorney's fees, which are an essential component of Title VII's enforcement scheme. Furthermore, the availability of a judicial forum is particularly important for statutes like Title VII, which concern public as well as private interests. Title VII suggests that a public forum is an appropriate arena for the judicial scrutiny of issues such as those raised by this case. Judicial construction is necessary because statutory language frequently can be given meaning only by reference to public law concepts. Alexander 415 U.S. at 57. A judicial forum

is also important to insure that the public interest in eliminating discrimination is given proper consideration.[3] In addition to the above, only limited review of the arbitral panel's decision is available, and there is no anti-discrimination policy found in the Rules of the New York Stock Exchange. In sum, there is an inherent conflict between the purposes underlying Title VII and the policy favoring arbitration under the FAA. See, Mitsubishi, 473 U.S. at 627-628; and

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[3] Further, construing a pre-dispute arbitration agreement to mandate arbitration of Title VII claims will have the effect of discouraging claimants from filing charges with the EEOC. Any procedure that inhibits the filing of charges undermines the purpose of Title VII to eliminate unlawful discrimination since the charge not only informs the EEOC of the particular discrimination, but also may identify other unlawful practices. See, EEOC v. Cosmair, Inc., 821 F.2d 1085, 1090 (5th Cir. 1987).

McMahon, 482 U.S. at 226. Title VII claims are not, therefore, subject to compulsory arbitration.

Petitioners try to draw a distinction between arbitration pursuant to a collective bargaining agreement and arbitration pursuant to an individual agreement. This distinction, however, is not born out either by this Court's decision in Alexander or its decisions under the FAA. First, the motive force behind the Alexander decision was not the peculiarities of grievance arbitration underlying a collective bargaining agreement, but rather what this Court found to be the Congressional intent to preclude a prospective waiver of a judicial forum for Title VII claims, and the comparative

inadequacy of the arbitral forum to decide them. Id. at 51-52, 56. As this Court stated in McDonald v. City of West Branch:

> "[O]ur rejection of a deferral rule in Gardner-Denver was based in large part on our conclusion that Congress intended the [statute] at issue in [Gardner-Denver] to be judicially enforceable and that arbitration could not provide an adequate substitute for judicial proceedings in adjudicating claims under [Title VII].

Id. at 285. See, also, Swenson, 858 F.2d at 1306; and Alford, 712 F.Supp. at 549.

Furthermore, contrary to the petitioners' position, this Court's decisions under the FAA actually bolster the conclusion that the distinction the petitioners attempt to draw between collective bargaining agreements and "individually-accepted" arbitration agreements is an invalid one. This Court's FAA decisions all recognize an exception to

the presumption of arbitrability with regard to statutory claims manifesting a Congressional intent to preclude the waiver of a judicial forum. Mitsubishi, 473 U.S. at 627-628; Shearson/American Express, Inc. v. McMahon, 482 U.S. at 226-227; and Rodriguez De Quijas, 109 S.Ct. at 1921. Therefore, unless it is found that the Congressional intent to preclude such a waiver is limited to a situation involving collective bargaining agreements, the rule of non-arbitrability must apply equally to all claimants without regard to the existence of a collective bargaining agreement. The inquiry in each instance must be whether "Congress wanted the substantive protection afforded by a given statute to include protection against waiver of a judicial forum, [an] intention

that will be deducible from text or legislative history." Mitsubishi, 473 U.S. at 628. In Alexander, this Court concluded with respect to Title VII claims, that there was just such a Congressional intent deducible from both the text and legislative history of Title VII. Id. at 51-52. Moreover, there is no indication in Alexander or elsewhere that the Congressional intent expressed in Title VII to preclude a prospective waiver of a judicial forum is limited to employees under a collective bargaining agreement.

Finally, petitioners argue that the Court of Appeals misconstrued Alexander by not finding that under Alexander Ms. Utley should at least be required first to exhaust the arbitration process before she

may pursue her Title VII claims in a judicial forum. Reading Alexander in the manner urged by petitioners, however, misconstrues not only the Alexander opinion but the Mitsubishi test as well. In Alexander, this Court carefully couched its language with respect to an employee going to arbitration before commencing a lawsuit in terms such as "permissive" or "elective". Id. at 49, 55, 59-60. Moreover, under Mitsubishi, this Court opined that if a Court finds a Congressional intent to preclude a waiver of a judicial remedy under Title VII, then the Title VII claim is outside the scope of an agreement to arbitrate and not subject to arbitration. See, McDonald v. City of West Branch, Michigan, 466 U.S. at 290-292

(text and n.11). See also, Gavalik v. Continental Can Co., 812 F.2d 834, 850 and n.30 (3d Cir. 1987). In McDonald, the Court held that:

> although arbitration is well-suited to resolving contractual disputes, our decisions in Barrentine and Gardner-Denver compel the conclusion that it cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that §1983 is designed to safeguard. 466 U.S. at 290.

In McDonald, the Court also cited Alexander v. Gardner-Denver as holding that the rights conferred by Title VII can form "no part of the collective bargaining process" since waiver of these rights would defeat the paramount Congressional purpose behind Title VII. 466 U.S. at 292 (n.12), citing Alexander, 415 U.S. at 51. Thus, while the legislative history and text of Title VII certainly support the principle that the administrative agency charged with

enforcing Title VII should highlight conciliation and informal resolution, it requires a quantum leap to suggest that it mandates exhaustion of arbitration before the NYSE in order for a victim of discrimination to pursue her Title VII claims. Ms. Utley submits that the petitioners' reading of the legislative history of Title VII is incorrect.[4]

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[4] For example, petitioners refer in their petition to the amendment to Title VII permitting courts to appoint a master under Fed. R. Civ. P. 53 if a case has been pending 120 days or more after issue has been joined. 42 U.S.C. 2000e-5(f)(5). Petitioners contend that the amendment supports their argument that Congress intended to provide non-judicial avenues for Title VII claims. However, by framing the issue as whether Congress intended to provide non-judicial forums for Title VII claims, defendants fail to acknowledge important distinctions between reference to a master and arbitration. First, the reference to a master takes place only if the issue has been joined, i.e., discovery has been completed. Secondly, there is a sharp contrast between court supervised masters, many of whom are magistrates, and arbitrators appointed by the New York Stock Exchange (e.g., in terms of expertise with the law and familiarity Title VII issues).

CONCLUSION

For all of the foregoing reasons, Ms. Utley respectfully requests the Court to deny the petitioners a writ of certiorari in this case.

Respectfully submitted,

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